87-1696

No. ___

In The

Supreme Court of the United States

October Term, 1987

Toyota of Berkeley,

Petitioner,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers Union,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. BOBAY
Counsel of Record
50 Hill Crest Court
San Anselmo, CA 94960
Tel: (415) 457-0720
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) May one party to a labor dispute unilaterally proceed through arbitration and obtain an ex parte award without the participation or consent of the other party where the collective bargaining agreement did not provide for either an ex parte arbitration proceeding or award?

(2) Does a labor arbitrator have the authority to decide issues which a party has not agreed to submit to arbitration?

(3) May a labor arbitrator determine his own jurisdiction and questions of arbitrability under a collective bargaining agreement when one party has refused to arbitrate any issue because the collective bargaining agreement clearly and unambiguously excluded the matter from arbitration?

(4) Is a labor arbitrator's award subject to bias or partiality when he is a defendant to a lawsuit between the parties before him and he seeks sanctions and satisfaction of his own debts from the party against whom the award is rendered at the time of the arbitration hearing and while the award is prepared?

THE PARTIES

Listed below are the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed.

Plaintiff-Appellee: Toyota of Berkeley
Defendant-Appellant: Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, Toyota of Berkeley, is the business name for the corporation, Southwick Group, Inc. which is a wholly-owned subsidiary of Automall, Inc.

Imported Cars of Berkeley, Inc., is an affiliate of Southwick Group, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS–(Continued)

TABLE OF AUTHORITIES

Pages

CASES:

STATUTES:

TABLE OF AUTHORITIES—(Continued)

Pages

TREATISES AND ARTICLES:

No. _____

In The

Supreme Court of the United States

October Term, 1987

Toyota of Berkeley,

Petitioner,

vs.

Automobile Salesmen's Union, Local 1095,
United Food and Commercial Workers Union,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals was published and is reported at 834 F.2d 751 (9th Cir. 1987).

JURISDICTION

The opinion of the court of appeals [App. A, infra, pp. A-1 through A-15] was filed on December 14, 1987,

and the judgment was entered on the same date. The order of the court of appeals denying the petition for rehearing [App. E, infra, p. A-26] was filed on January 13, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) (1966).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. section 185(a) (1978), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Petitioner, Toyota of Berkeley,[1] and the Respondent, Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union,[2] were parties to a collective bargaining agreement which expired on May 31, 1983.[3] Section 17 of the former agreement called for arbitration of "disputes arising from the interpretation or application of its *specific provisions*". Collective Bargaining Agreement §17-1 [App. G, infra, p. A-40].

To bring a dispute to arbitration, the Company and Union required that the matter "shall first be reduced to writing, citing the specific provisions . . . allegedly violated, including the relief sought. To . . . insure the prompt settlement of disputes, [it was further agreed that] the *Union shall serve written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days* from the date the incident giving rise to the grievance is alleged to have first occurred." Collective Bargaining Agreement §17-5 [App. G, infra, pp. A-40 through A-41].

---

[1] The Petitioner, Toyota of Berkeley, will be referred to hereinafter as "the Company".

[2] The Respondent, Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union, will be referred to hereinafter as "the Union".

[3] No new agreement has been made between the Company and the Union.

Expressly excluded from arbitration was "any grievance [which] was not submitted in accordance with the provisions", because, in such cases, the Company and Union agreed that the grievance "shall be dismissed." Collective Bargaining Agreement §17-6 [App. G, infra, p. A-41]. For any extension or waiver of the requirements, the arbitration provisions imposed the condition precedent that it be done so "only upon mutual agreement in writing." *Id.*

Arbitration under the agreement was not self-executing; the provisions neither allowed for default awards in the event one party refused to attend an arbitration hearing nor set out a procedure for determining which issues were to be submitted to arbitration if the parties could not agree on the submission.

Once the submitted issues had been heard at the arbitration, the Company and the Union sharply circumscribed exactly what the arbitrator could do and agreed that he would "*have no power to add to, or subtract from, or modify any of the provisions*" of the agreement. Collective Bargaining Agreement §17-7.2 [App. G, infra, p. A-41]. The Company and the Union further agreed that, "[i]n rendering decisions, the arbitrator shall have due regard for the rights and responsibilities of the Employer and shall so construe the Agreement so that there will be no interference with the exercise of such rights and responsibilities". Collective Bargaining Agreement §17-7.4 [App. G, infra, p. A-41]. And, *the Company and the Union precluded the arbitrator from deciding any question of arbitrability*; it was agreed "that the power and jurisdiction of the arbitrator shall be limited to deciding whether there

has been a violation of a provision of this Agreement." Collective Bargaining Agreement §17-7.6 [App. G, infra, p. A-42].

On December 2, 1982, the Company laid off Edward Fontes, one of its new car salesmen. The Union did not make a written request for arbitration until August 1, 1984, over a year and a half after the layoff and well outside the agreement's 30 day limit for arbitrability. Even then, the Union's demand for arbitration did not set out what provision of the collective bargaining agreement for which it sought interpretation or what issues it was submitting. There was no evidence of a written extension or waiver of the limit on arbitrability.

The parties then selected Joe Henderson as arbitrator but they did not agree on what issues if any, to submit for arbitration. After several mutual postponements of holding an arbitration hearing, the Company wrote Henderson on June 9, 1986 stating that it would not participate in the arbitration on the ground that the matter was not arbitrable under the Agreement's exclusion for late arbitration demands. In response, the Union requested Henderson to set a new date and proceed ex parte if necessary. Henderson agreed with the Union and advised the parties that he would take it upon himself to determine the questions of arbitrability and set August 6 as the date for the hearing. The Company wrote back and said it would not participate because the matter was not arbitrable. On July 28, Henderson reset the hearing for September 3 and stated that he would proceed ex parte unless the Company obtained a court order prohibiting the arbitration.

On August 22 and 25, the Company asked Henderson to cancel the proposed ex parte hearing. Failing that, the Company told Henderson that it would have to file suit for injunctive relief against him and the Union. Henderson then proposed that conference call be held between all the parties involved on August 28. The Company arranged the call for that day and tried again the next day but Henderson was unavailable.

On September 2, the Company told Henderson that it was filing suite against him and the Union over the ex parte hearing and that application for the temporary restraining order would be made before the hearing on September 3.

On September 3 at 9:53 a.m., the Company filed suit against Henderson and the Union in the United States District Court for the Northern District of California. The basis for subject matter jurisdiction stood on section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. section 185(a) (1978). Shortly after filing, the district court issued its temporary restraining order against the threatened *ex parte* arbitration between 10:20 and 10:30 a.m. Arbitration Decision of Joe Henderson (dated Sept. 23, 1986) (hereinafter referred to as "Henderson Award") [App. F, infra, p. A-35].

The Union and Henderson commenced the arbitration hearing at 10:45 a.m. on September 3, 1986. Henderson Award [App. F, infra, p. A-35]. A half-hour later, the Company called Henderson and the Union and advised them that the restraining order had issued. When Henderson was served with the court papers that

afternoon, he responded, "As far as I am concerned, that federal judge doesn't have any jurisdiction over me and if he wants to send a marshall up here he can."

On September 7, Henderson filed his opposition to the injunctive relief and demanded that the Company and its counsel dismiss him and pay an extra $2,300 as a personal debt for his attorney's fees in opposing the suit. Because Henderson and the Union claimed that arbitration hearing had already taken place, Henderson's presence became moot and the Company served its dismissal of Henderson from the district court suit on September 9.

On September 23, Henderson told the district court and the parties that he had prepared his decision but he refused to issue it until the Company and its counsel paid him the extra $2,300 demanded. District Court's Order to Show Cause Why Henderson Should not be Held in Contempt of Court [App. D, infra, p. A-20]. The district court viewed Henderson's attempt to coerce the extra fees as an obstruction of justice and ordered him to either issue the decision or suffer contempt of court. *Id.* Henderson then filed his decision on October 7.

Henderson's decision found that the matter was arbitrable and his ex parte hearing valid. Henderson went on to find in favor of the Union and awarded the grievant Fontes backpay and benefits. Henderson Award [App. F, infra, p. A-39].

On November 7, the Union and the Company moved to confirm and vacate the award respectively. On November 21, Henderson filed a motion under Rule 11

of the Federal Rules of Civil Procedure seeking the $2,300 from the Company and its counsel which the district court denied. [App. C, infra, p. A-18].

On December 29, the district court vacated the arbitration award on the grounds that the collective bargaining agreement did not provide for a self-executing or ex parte arbitration and that the award was the product of bias or prejudice on the part of Henderson. [App. B, infra, pp. A-16 through A-17].

The Ninth Circuit Court of Appeals reversed. [App. A, infra, pp. A-1 through A-15]. The court of appeals held that once the parties select an arbitrator and schedule a hearing, albeit later mutually postponed, the arbitration may proceed ex parte and render an enforceable default award even though the collective bargaining agreement does not provide for an ex parte procedure and even though the parties have not agreed on what-issues to submit for arbitration. [App. A, infra, pp. A-6 through A-9].[4]

Turning to the question of bias, the court of appeals viewed the district court's requirement that "arbitrators are held to the same high standards of impartiality

---

[4] The court of appeals also erroneously found that the district court "concluded that the dispute over the timeliness of the Fontes grievance was arbitrable, and Toyota does not raise this issue on appeal." [App. A, infra, p. A-6]. As to the arbitrability issue, the district court judge stated that "I am not prepared *at this time* to grant plaintiff's [the Company's] motion to vacate the arbitration award on that ground." Because the district court held that ruling in abeyance, the Company had no ruling to cross-appeal from.

as judges" as too lofty a standard. [App. A, infra, pp. A-9 through A-11]. The court of appeals held that the "appearance of bias" on the part of Henderson was not enough and the facts that Henderson was a defendant to the underlying lawsuit during the arbitration hearing and sought $2,300 from the Company and its counsel while preparing his decision and thereafter was insufficient to establish partiality on the arbitrator's part. [App. A, infra, pp. A-14 through A-15].

The opinion of the court of appeals has turned upside down the notion that labor arbitration is a product of an agreement between the parties. The decision allows one party to enforce an ex parte arbitration award even though the collective bargaining agreement does not provide for one. The decision allows one side to have issues decided by the arbitrator irrespective of whether the collective bargaining agreement excludes the matter from arbitration and irrespective of whether the other side submits the matter from arbitration. The decision permits an arbitrator with an ethical standard lower than that required for the judiciary to determine his own jurisdiction and arbitrability – all in disregard of the bright line principles established by this Court.

REASONS FOR GRANTING THE PETITION

I

THE OPINION OF THE COURT OF APPEALS HOLDING THAT AN EX PARTE ARBITRATION MAY RESULT IN AN ENFORCEABLE DEFAULT AWARD UNDER A COLLECTIVE BARGAINING AGREEMENT WHICH DOES NOT PROVIDE FOR SELF-EXECUTING ARBITRATION LEAVES HOLLOW THE PRINCIPLE OF THIS COURT THAT ARBITRATION MUST BE A PRODUCT OF THE AGREEMENT BETWEEN THE PARTIES

The first question presented by this petition is whether an ex parte arbitration award may result in an enforceable default award against a party who refused to participate in the arbitration hearing. The court of appeals held that once the parties have chosen an arbitrator, the parties must participate in the arbitration otherwise risking default even though the collective bargaining agreement does not provide for self-executing arbitration – an arbitration procedure which specifically permits a party to proceed *unilaterally* and ex parte through arbitration. *Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095*, 834 F.2d 751, 754-755 (9th Cir. 1987). This holding denies the fundamental premise and principles of labor arbitration as set down by this Court.

This Court has consistently held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers of America*, ___U.S.___, 106 S.

Ct. 1415, 1418 (1986), *quoting, United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

The Company and the Union made and entered their collective bargaining agreement in California. They legitimately expected that its provisions would be interpreted according under California law. They did not provide pursuant to their arbitraton clause that either party could unilaterally proceed with an arbitration hearing without the other party's participation therein or that an award could result from an ex parte hearing. California law holds that unless the parties specifically provide otherwise, arbitration is not self-executing and one party may not unilaterally proceed with an ex parte arbitration. The general rule is:

> a right to compel arbitration is not, *unless expressly provided for in the agreement*, self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right, *and is required* to go to the court where plaintiff's action lies.

Gunderson v. Superior Court, 46 Cal. App. 3d 138, 143, 120 Cal. Rptr. 35 (2d Dist. Ct. App. 1975); California Continuing Education of the Bar, Using Contractual Arbitration for Cost Effective Dispute Resolution §53 at 30 (1982) (when the arbitration clause is not self-executing and the challenging party challenges the proponent's right to arbitrate, the proponent *must* file a petition to compel arbitration).

Therefore pursuant to the agreed provisions of the arbitration clause between the Company and Union,

when the Company refused to participate in the arbitration hearing, the Union's exclusive remedy for proceeding with the arbitration was to file an action to compel arbitration.

The court of appeals' ruling here ignored the effect of the arbitration agreement between the parties. The court of appeals completely rewrote the arbitration agreement to provide for ex parte arbitration where none existed before and whether or not either party agreed to participate. The result was an arbitration hearing which was not the product of the parties' agreement and in derogation of the fundamental principles of this Court.

II

THE OPINION OF THE COURT OF APPEALS PERMITS THE ARBITRATOR TO DECIDE QUESTIONS WHICH THE PARTIES HAVE NOT SUBMITTED FOR DECISION BY HIM

The second question presented by this petition is closely related to the first which is may a party be forced to submit questions to arbitration which he has not agreed to submit. The court of appeals' decision leaves this answer in the affirmative and contrary to the manner in which labor arbitrations have been conducted under the decisions of this Court because it allows one party to submit any issue it chooses for decision by the arbitrator even though not covered by the agreement or submission of the parties.

In *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court held there that:

> we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas *marked out for his consideration*. It is not apparent that he went beyond the submission.

363 U.S. at 598 (emphasis added).

Since that decision, this language has been construed to mean that above and beyond the scope of the arbitration clause, the arbitrator may only decide those issues "marked out for his consideration" – the issues that the parties voluntarily submitted for the arbitrator's informed decision. *E.g, Retail Store Employees Local 782 v. Sav-On Groceries*, 508 F.2d 500, 502-503 (10th Cir. 1975). For example, if the parties submit the issue of an employee's discharge, the arbitrator is not permitted to determine the legitimacy of another employee's discharge.

In the ordinary course of processing a labor arbitration, the parties voluntarily submit an issue for decision by the selected arbitrator in either one of two ways. They may enter into a submission agreement which sets out and defines the precise issue or issues for the arbitrator to decide. Or failing agreement on that, they may *agree* that the arbitrator should be permitted to define the issue for decision.

Processing the arbitration at issue here, the Company and Union could not agree on the issues for submission. Because the matter was specifically excluded

from the arbitration by the collective bargaining agreement, the Company refused to tender both the question of arbitrability and the substantive issues for decision by the arbitrator.

Despite these facts, the opinion of the court of appeals necessarily holds that once the arbitrator is selected, the parties are deemed to have agreed to be bound by any and all issues that the arbitrator or the other party might choose to have decide. The opinion in effect grants a free license to the arbitrator to disregard the "area marked out for his consideration" and is therefore contrary to the prior decisions of this Court.

III

THE OPINION OF THE COURT OF APPEALS ALLOWS THE ARBITRATOR TO DECIDE IN THE FIRST INSTANCE THE QUESTION OF ARBITRABILITY AND NOT THE COURTS

The third question presented on this petition is whether the question of arbitrability can be left to the arbitrator in the first instance by labelling the agreement of the parties to arbitrate as a matter of procedure. By taking this Court's opinion in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) out of its context, the court of appeals has decided this question so as to completely emasculate this Court's established rule, again emphasized in *AT & T Technologies, Inc. v. Communications Workers of America*, ___U.S.___, 106 S. Ct. 1415 (1986), that "the duty to arbitrate being of contractual origin, a compulsory submission to arbitration *cannot precede* judicial determination that the collective bargaining agreement, does in fact create such a

duty." 106 S. Ct. at 1419. In *AT & T*, this Court explained:

> The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction. . . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." Ibid.

___U.S. at___, 105 S. Ct. at 1419-1420.

The Company and the Union drew up their agreement to arbitrate with a very specific result to meet a precise contingency. They spelled out in clear and unambiguous terms that any dispute for which the Union did not make a written demand for arbitration within 30 days must be excluded from arbitration. When the Union submitted its written demand for arbitration a year and a half late, the Company refused to submit the matter to arbitration because it was not arbitrable under the agreement.

Under the guise that a procedural question was at issue, the court of appeals ignored this Court's principles and placed the question of arbitrability exclusively with the arbitrator thereby allowing him to determine his own jurisdiction. The end result was that the arbitrator in an ex parte hearing was permitted to determine the arbitrability of matter in the first instance and, relying on his own notions of equity and industrial

justice, created his version of an agreement to arbitrate contrary to the clear and unambiguous language of what the parties had agreed to beforehand.

The decision of the court of appeals has turned on its head those pleasant sounding notions that the agreement to arbitrate was a product of negotiation and that arbitration is what the parties bargained for. The Company and the Union negotiated and expressly agreed to exclude any grievance from arbitration if written demand was not made with 30 days. Having bargained for the right to exclude such matters from arbitration, the Company did not receive the benefit of that bargain but instead a default award. If the purpose of arbitration is to make a speedy dispute-resolution mechanism available for both parties, then the arbitrator's modification of the arbitration agreement threw to the winds any such advantage. There could be no speedy resolution when the arbitrator permitted the Union to sit back for a year and a half before making its demand for arbitration.

The Company, with prudent foresight as it turned out, sought to protect itself from an onslaught of the Union's stale demands for arbitration where the presentation of a proper defense would be handicapped by the fading memories of the witnesses and by the difficulties in digging up documentary evidence and alleged oral agreements – evidence difficult to prove or disprove and which invite controversy.

By allowing the arbitrator to determine the question of arbitrability in the first instance, the court of appeals has rendered empty the promise that a party

can protect itself from the hazards of arbitration resulting from incompetent and unfair awards by simply negotiating for their exclusion. What good does it do the party to negotiate for the outright exclusion of a matter from arbitration when the arbitrator can simply disregard the express and unambiguous language of the agreement to arbitrate and find his own jurisdiction to hear the grievance?

As support for its exception, the court of appeals relies on what it views as a "suggestion" in this Court's opinion in *Wiley*, that "procedural questions should be left to the arbitrator". 834 F.2d at 754, *citing, Retail Delivery Drivers, Local 588 v. Servomation Corp.*, 717 F.2d 475, 478 & 477 (9th Cir. 1983). But, by focusing solely on this so-called "suggestion", the court of appeals has passed over the true meaning of *Wiley* and ignored the parties' agreement to arbitrate. This Court has repeatedly emphasized that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." 376 U.S. at 547.

Wiley did not intend for the court's duty in determining the threshold question of arbitrability to turn on the labels of procedural issues versus substantive issues. *AT & T* did not address the question of arbitrability in such terms either. The labels, procedural and substantive, have never lent themselves to any sort of credible or erudite analysis. Indeed, *Wiley* cautioned the courts from embroiling themselves in a dispute over the application of such terms. This Court wrote: "We think that labor disputes of the kind involved here

cannot be broken down so easily into their 'substantive' and 'procedural' aspects." 376 U.S. at 556.

Relying on such labels, the court of appeals' treatment of the arbitrability issue in this ex parte proceeding permitted the arbitrator to make the initial and final determination of his own jurisdiction which *Wiley* forbade. By upholding this ex parte arbitration even though the Company refused to participate on the grounds that it was not arbitrable and excluded from arbitration, the opinion of the court of appeals conflicts with the doctrine of this Court and it has created an unwarranted exception to the rule that it is for the court, not the arbitrator, to initially determine whether the parties had agreed to arbitrate.

IV

THE OPINION OF THE COURT OF APPEALS HAS LOWERED THE ETHICAL STANDARDS AND REQUIREMENTS OF NEUTRALITY REQUIRED OF AN ARBITRATOR BY THIS COURT

The fourth question presented by this petition is whether an arbitrator should be permitted to hear an arbitration and render a decision thereon while he is a defendant to the underlying lawsuit brought by one of the parties to the arbitration and while he seeks $2,300 in fees from that party and that party's counsel. The opinion of the court of appeals answered this question in the affirmative and did so by holding that arbitrators are *not* held to the same ethical standards and requirements of neutrality as the judiciary. 834 F.2d at 755-756. This holding is directly contrary to the decisions of this Court.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), this Court held that arbitrators are held to the same standards of ethics and requirements of neutrality that are expected on the part of the judiciary and "not only must be unbiased but avoid even the appearance of bias." 393 U.S. at 150. This Court went on to warn that:

> we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

393 U.S. at 149.

Completely ignoring the teachings of this Court, the court of appeals declined to hold the arbitrator to the standards set out by this Court. The court of appeals fashioned its decision in such a way to permit an arbitrator to hear evidence and prepare his decision while he was a defendant to the underlying lawsuit between the parties appearing before him and while he sought $2,300 against one of the parties and its counsel and while he threatened to sue them for malicious prosecution and other related torts.

Both at common law and under federal statute, 28 U.S.C. §455(B)(5)(i)(1987), Lord Coke's requirement that "no man shall be a judge in his own case" has been applied to make disqualification without question when the judge is a party to the underlying lawsuit. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 610 (1947). Disregarding this longstanding rule with respect to the judiciary, the court of appeals held that the fact that

the fact that the arbitrator was a defendant was insufficient to establish a question of bias.

As the district court correctly pointed out, "people tend to get mad when they get sued . . . [and] it is difficult to believe that he could have conducted the hearing on September 3rd with a completely open mind." And, while not making this finding, the district court observed that "it could be reasonably inferred that Henderson [the arbitrator] was out for blood."

The record bears out the district court. The arbitrator disregarded the authority of the court and even risked contempt of court. He threatened the Company and its counsel with his own lawsuit and sanctions while preparing his decision.

The court of appeals viewed this behavior of the arbitrator as "reasonable" and "natural" reactions to being a defendant. 834 F.2d at 757. Whether "natural" or not, it made the arbitrator intimately involved, having both a personal and financial stake, with the outcome of the arbitration and he should have been disqualified. If the arbitrator had issued a decision in favor of the company, he would have cut the legs off his motion for sanctions or any lawsuit against the Company or its counsel. On the other hand, by ruling in favor of the Union, he was able to support his position that the Company had no reasonable basis for either refusing to participate in the arbitration or enjoining its decision.

The treatment of the bias issue by the court of appeals conflicts with the decisions of this Court and fails to uphold the most important qualification

demanded of an arbitrator – that of impartiality. Elkouri & Elkouri, How Arbitration Works 92 (3d ed. 1973).

By upholding the arbitration award, the court of appeals created a manifest violation to the principles that arbitration is fair and a product of the parties' agreement. Both of which are important reasons for granting the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. BOBAY
Counsel of Record
50 Hill Crest Court
San Anselmo, CA 94960
Tel: (415) 457-0720
Counsel for Petitioner

April 12, 1988

(Appendices follow)

Appendix A

For Publication

United States Court Of Appeals
For The Ninth Circuit

No. 87-1555

D.C. No.
CV-86-5077-JPV

Toyota Of Berkeley, a corporation,
Plaintiff/Appellee

vs.

Automobile Salesman's Union, Local 1095,
United Food And Commercial Workers Union,
Defendant/Appellant.

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, District Judge, Presiding

Argued and Submitted
October 7, 1987–San Francisco, California

Filed December 14, 1987

Before: Procter Hug, Jr., Robert Boochever and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Boochever

COUNSEL

John R. Bobay, San Anselmo, California, for the plaintiff/appellee.

David A. Rosenfeld, San Francisco, California, for the defendant/appellant.

OPINION

BOOCHEVER, Circuit Judge:

The Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union (Union) appeals the district court order vacating an arbitration award on the grievance of a discharged employee. The district court held that the ex parte arbitration hearing was improper and the arbitrator was biased. We reverse.

At issue is the right to proceed ex parte with an arbitration after both parties have agreed to arbitration and the time and place of arbitration. We also must decide the proper standard for determining bias of an arbitrator and whether the district court erred in deciding that there was bias because the arbitrator proceeded ex parte, was named a defendant in a civil suit filed by a party to the arbitration seeking injunctive relief from the arbitration, and later sought sanctions against the attorney for the plaintiff in that suit.

FACTS

Toyota of Berkeley (Toyota) and the Union were parties to a collective bargaining agreement. Section 4 of the agreement covers the discharge of employees. Section 17 of the agreement calls for the arbitration of disputes arising from the interpretation of its specific provisions. The section requires that grievances be submitted in writing within seven days of the alleged violation of the agreement, and that demands for arbitration be submitted within 30 days.

Toyota discharged Edward Fontes, an automobile salesman, on a date which is unclear. Toyota alleges that it fired Fontes on December 2, 1982. On February 15, 1983, the Union submitted a grievance to Toyota. Toyota replied that it had insufficient information about the grievance, and asked for particulars without waiving any rights as to procedural defects, including the timeliness of the grievance. Four months later, in a letter of June 23, 1983, the Union responded to Toyota's "recent" position that the Union had failed to demand arbitration timely with a claim that Toyota had "always been on notice that the Union intended to proceed to arbitration." Not until August 1, 1984, did the Union submit its formal demand for arbitration.

More than six months later, Toyota wrote to the arbitrator, Joe Henderson, confirming an April 15, 1985 date for the hearing on Fontes' discharge. Just before the scheduled hearing, the parties agreed to postpone the hearing because of another pending matter involving timeliness of arbitration demands, which was resolved by a memorandum decision of this court upholding arbitrability dated March 26, 1986.[1]

---

[1] *Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union*, No. 85-1947 (9th Cir. Mar. 26, 1986), *cert. denied*, 107 S. Ct. 1602 (Mar. 30, 1987). 9th Cir. R. 36-3 specifies in part that a disposition of this court which is not designated for publication "shall not be cited to or by this court . . . except when relevant under the doctrine[ ] of . . . *res judicata*." (emphasis added). Here, the memorandum decision resolved the issue of the arbitrability of timeliness as between Toyota and the Union, and was therefore res judicata in the district court.

On June 9, 1986, Toyota wrote Henderson that it would not participate in the arbitration because of the Union's failure to comply with procedural requirements (i.e., the failure to file a grievance and demand arbitration timely). The Union's response was to write Henderson (with a copy to Toyota) requesting him to set a date and to proceed, whether or not Toyota participated. Henderson scheduled the arbitration for August 6, and Toyota responded on July 3 that the dispute over timeliness was not arbitrable and it would not participate. On July 28, Henderson rescheduled the hearing to 10:00 on September 3, to allow Toyota to seek a court order prohibiting arbitration.

On September 2, Toyota told Henderson that it planned to seek a temporary restraining order in district court on September 3, the day of the hearing. Henderson waited until 10:45 a.m. on September 3, and then began the hearing without Toyota. A half-hour later, the hearing was over when a call from Toyota informed Henderson and the Union that Toyota had obtained a restraining order. Toyota's complaint named Henderson as a codefendant, and alleged that he conspired with the Union to violate the collective bargaining agreement by holding an ex parte hearing to determine arbitrability. It asked that he be enjoined from arbitrating the dispute, rendering an award, or demanding a cancellation fee.

Henderson filed an opposition to Toyota's motion for injunctive relief, and Toyota dismissed the action as to Henderson on September 12. On September 26, the court dissolved the temporary restraining order, denied

the application for a preliminary injunction, and set the case for hearing on cross-motions for summary judgment.

Henderson's decision is dated September 23, but he refused to issue it pending the payment of his arbitrator's fees by both parties and Toyota's payment of his attorney fees and costs incurred in the civil injunction suit. On September 29, the court ordered him to issue the decision. Henderson filed his decision in court on October 7. Henderson found that Fontes was fired on February 9, 1983 and that his grievance was timely. Henderson awarded Fontes back pay and benefits. The decision further stated that the issue of timeliness was arbitrable and the ex parte hearing was valid.

On November 21, Henderson filed a motion in the district court for sanctions against Toyota's attorney. Also pending in the district court were the parties' motions for summary judgment. Pursuant to stipulation, the motions were heard as cross-motions to vacate and confirm the award. After a hearing, the district court vacated the arbitration award on the grounds that the ex parte hearing was improper and the award was the result of Henderson's bias. Henderson's motion for Rule 11 sanctions was denied on the same day.

DISCUSSION

(1) *The ex parte arbitration hearing*

The Union argues that the district court erred in vacating the arbitration award on the grounds that the September 3 arbitration hearing was improper becuase it was held ex parte, without Toyota's participation. We

review this question of law de novo. *United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.)(en banc), *cert. denied*, 469 U.S. 824 (1984).

Toyota's purported reason for refusing to attend the hearing was that the timeliness of Fontes' grievance and the demand for arbitration was not arbitrable. While it is a court's duty to decide whether disputes over substantive interpretations of a labor agreement are to be resolved through arbitration. *AT&T Technologies v. Communications Workers of Am.*, 106 S. Ct. 1415, 1420 (1986), procedural questions related to substantive issues that are arbitrable under the agreement are for the arbitrator to decide in the absence of a contrary provision. *Local 370, Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1358 (9th Cir. 1986)(quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). This circuit has held that timeliness is a procedural question subject to arbitration. *Retail Delivery Drivers Local 588 v. Servomation Corp.*, 717 F.2d 475, 478 (9th Cir. 1983). The district court judge correctly concluded that the dispute over the timeliness of the Fontes grievance was arbitrable, and Toyota does not raise this issue on appeal. The issue is not whether Henderson had jurisdiction over the dispute, but rather whether he could proceed without Toyota present.

This court has yet to rule on the issues presented by ex parte arbitration, but the general trend of authority is clear. Under a collective bargaining agreement specifically providing for designation of an arbitrator without the participation of both parties, an arbitrator may issue an enforceable default award when one party

fails to attend the hearing. *Corallo v. Merrick Central Carburetor,* 733 F.2d 248, 251 n.1 (2d Cir. 1984); F. Elkouri & E. Elkouri, *How Arbitration Works* 247 (4th ed. 1985). If an agreement provides that the parties shall jointly select an arbitrator, however, a court may refuse to enforce an award made following an ex parte hearing before an arbitrator selected without the defaulting party's cooperation, on the grounds that the party not in default should have sued to compel arbitration. *Sam Kane Packing Co. v. Amalgamated Meat Cutters,* 477 F.2d 1128, 1135-36 (5th Cir.), *cert. denied,* 414 U.S. 1001 (1973); Elkouri & Elkouri at 247-48. If the parties did cooperate in selecting an arbitrator as specified by the agreement, and the defaulting party has adequate notice of the hearing, the failure to attend does not nullify the award. *See Sam Kane,* 477 F.2d at 1136 ("we would be faced with a strong case for the award"); American Arbitration Association Voluntary Labor Arbitration Rule 27.3 Lab. Rel. Rep. (BNA)(88 Lab. Arb.) 3 (June 17, 1987)("Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment.").

The district court held that the ex parte hearing was improper because the arbitration clause in the collective bargaining agreement was not "self-executing," that is, did not provide that either party could demand arbitration and select an arbitrator without the other's cooperation. Section 17 of the agreement provides that unresolved grievances are to be "referred to an impartial arbitrator," and outlines a procedure for selecting an arbitrator should the parties fail to agree.

The Union and Toyota did agree on an arbitrator; Toyota confirmed the initial date and location of the hearing, agreed to a postponement, and otherwise showed every intention to participate over a period of nearly three years. When it reversed its position and declared it would not arbitrate, Henderson rescheduled the hearing date to give Toyota time to seek a court order restraining arbitration. Toyota delayed until the morning of the hearing, so that the arbitration was completed before Henderson received notice of the temporary restraining order.

Section V(C) of the Code of Professional Responsibility for Arbitrators of Labor/Management Disputes requires that the arbitrator consider the relevant legal and contractual circumstances and ensure adequate notice before proceeding ex parte. Code of Professional Conduct § V(C). 3 Lab. Rel. Rep. (BNA)(88 Lab. Arb.) 208 (June 17, 1987). Henderson quotes from the Code in his decision and clearly attempted to avoid proceeding without Toyota. Toyota willfully chose not to attend. Under these circumstances, the ex parte hearing did not violate due process. *See Bernstein Seawell & Kove v. Bosarge,* 813 F.2d 726, 729 (5th Cir. 1987). "To allow a party to avoid the effect of a grievance proceeding by merely refusing to participate would destroy any incentive to peacefully negotiate labor disputes." *Teamsters Freight Employees Local 480 v. Bowling Green Express, Inc.,* 707 F.2d 254, 258 (6th Cir. 1983).

Nor was the Union required to seek a court order requiring arbitration. Where, as here, one party withdraws after selection of an arbitrator and the scheduling of a hearing, the burden of going into court

should rest on the party contesting the right to arbitrate under the contract. *See Amalgamated Meat Cutters No. 385 v. Penobscot Poultry, Co.*, 200 F. Supp. 879, 882-83 (N.D. Me. 1961)(listing authority that party seeking arbitration must get court order only when agreement provides arbitration may not proceed without one).

(2) *The bias of the arbitrator*

a) *The legal standard for "evident partiality"*

The Union further argues that the district court erred in vacating the arbitrator's award on the ground that the arbitrator was biased. The district court held that "arbitrators are held to the same high standards of impartiality as judges," and found Henderson was biased because he had been named as a party to Toyota's suit against the Union and because he filed for sanctions against Toyota's attorney.

The district court's adoption of a standard of impartiality for arbitrators is a question of law which we review de novo. *McConney,* 728 F.2d at 1202-04.

The Federal Arbitration Act at 9 U.S.C. § 10(b)(1982) provides that a court may vacate an arbitrator's award "[w]here there was evident partiality . . . in the arbitrator[ ]. . . ." In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), a plurality of the Supreme Court construed section 10 to require that arbitrators meet the ethical standards of federal judges and avoid "even the

appearance of bias." *Id.* at 148-50.[2] Courts of appeals ruling on the issue have adopted the reasoning of Justice White's concurrence that arbitrators, who are often effective because of their connections to the marketplace, should not be disqualified automatically by a business relationship with the parties if it is fully disclosed or trivial. *Id.* at 150. In *Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745-46 (9th Cir. 1985), this circuit held that the appearance of impropriety, standing alone, is insufficient to establish bias, and that the burden of proving specific facts indicating improper motives rests on the party challenging the arbitration award. *See also Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83-84 (2d Cir. 1984)(a less stringent standard than for federal judges, finding evident partiality where a reasonable person would have to conclude that the arbitrator was partial); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.)("circumstances must be powerfully suggestive of bias"), *cert. denied*, 464 U.S. 1009 (1983); *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1150 (10th Cir.)(evidence of impropriety must be direct, definite, and capable of demonstration), *cert. denied*, 459 U.S. 838 (1982).

The district court applied too stringent a standard. Before a court can vacate an arbitration award because of "evident partiality" on the part of the arbitrator, the party alleging bias must establish facts that create "a

---

[2] Title 28 U.S.C. § 455(a)(1982) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

reasonable impression of partiality." *Sheet Metal Workers,* 756 F.2d at 745.

b) *Henderson's bias*

Assuming application of the proper legal standard, we review the district court's factual finding of bias under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Hy Chan Banh v. United States,* 814 F.2d 1358, 1361 (9th Cir. 1987). As we have indicated, the legal standard applied by the district court subjected Henderson's behavior to a more exacting scrutiny than necessary. Under the proper standard, a conclusion that the award must be vacated because of Henderson's bias would be clearly erroneous.

Most of the disputes concerning an arbitrator's alleged partiality which have found their way into courts of appeal concern possible conflicts of interest existing before the arbitration. Such situations include an arbitrator's financial interest in the outcome of the arbitration. *Sheet Metal Workers,* 756 F.2d at 746, an arbitrator's ruling on a grievance that directly concerned his own lucrative employment for a considerable period of time. *Pitta v. Hotel Ass'n of New York,* 806 F.2d 419, 423-24 (2d Cir. 1986), a family relationship that made the arbitrator's impartiality suspect, *Morelite Constr.,* 748 F.2d at 85, the arbitrator's former employment by one of the parties. *Merit Ins.,* 714 F.2d at 677, and the arbitrator's employment by a firm represented by one of the parties' law firms, *Ormsbee Dev.,* 668 F.2d at 1149. In many cases, it was the arbitrator's failure to disclose the financial or personal relationship as much as the actual potential for conflict that fueled

the claim of bias. *Sheet Metal Workers,* 756 F.2d at 746; *Merit Ins.,* 714 F.2d at 678; *Ormsbee Dev.,* 668 F.2d at 1149.

Toyota's grounds for alleging that Henderson was biased are quite different. Toyota does not claim that Henderson had any preexisting relationship with the Union, financial or otherwise. Nor does it assert that Henderson failed to disclose or concealed any conflict of interest. Instead, Toyota points to Henderson's status as a party to Toyota's suit for injunctive relief and to his filing against Toyota's counsel to recover a "personal debt" (Fed. R. Civ. P. 11 fees and sanctions) as evidence that Henderson was not impartial.

Toyota filed its lawsuit naming Henderson as a party in district court on the morning of September 3, 1986, at 9:53 a.m., seven minutes before the arbitration was scheduled to begin. The court issued the temporary restraining order shortly thereafter. While Henderson knew that Toyota planned to seek a temporary restraining order and waited for forty-five minutes before starting the hearing, he did not learn of the issuance of the order until after the hearing was over.[3] Toyota's complaint alleged that Henderson conspired with the Union to determine the arbitrability of the dispute and to hold the ex parte arbitration hearing.

---

[3] A temporary restraining order or preliminary injunction is binding on a party when he or she "receive[s] actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d); *United States v. Baker,* 641 F.2d 1311, 1314-15 (9th Cir. 1981). Toyota does not claim that Henderson was bound by the order to halt the arbitration hearing.

The mere naming of Henderson as a defendant in a lawsuit to enjoin the arbitration does not create even an appearance of bias in his conduct of the hearing. He did not know the specific allegations until he was served with a copy of the complaint on the afternoon following the hearing. It would be clearly erroneous to rely on Henderson's party status to establish a reasonable impression of bias in his conduct of the September 3 hearing.

The more serious allegation is that Henderson was biased while he prepared his decision. Toyota contends that Henderson's filing for sanctions under Fed. R. Civ. P. 11 indicates bias.

Henderson filed for sanctions against Toyota's attorney on November 21, two months after he prepared his decision. Four days after the hearing, in a letter urging Toyota to drop Henderson as a party, his attorney wrote Toyota that Henderson planned to seek sanctions. Henderson's grounds for filing for sanctions were that Toyota's attorney had failed to read the pleadings, and that the action was frivolous and filed for the purpose of harassing Henderson. Toyota's attorney admitted that the inclusion of the allegations of conspiracy in the complaint was a word processing error, and the district court refused even to address the issue of conspiracy in the discussion of the arbitrator's bias.

We are concerned with the effect of the allegations, if any, on Henderson's professional judgment as evidenced by his actions following the hearing and prior to the filing of his opinion. Henderson's behavior in no

way creates an appearance of partiality. He prepared his decision as he had contracted to do. His refusal to issue it until his fees were paid was entirely reasonable. His further request that Toyota pay his attorney fees and costs in the district court case was also a reasonable response as a named defendant in Toyota's complaint. The district court denied his request and issued an order compelling him to issue his opinion. That order was issued after the preparation of his decision and could in no way have influenced it.

Henderson was understandably eager to defend himself against Toyota's accusations; his professional reputation was at stake. He asked for sanctions not against Toyota but against Toyota's attorney, thus providing even less support for a finding that he was biased against Toyota itself. The district court judge appears to have accepted Henderson's actions in filing for sanctions against Toyota's attorney as a natural reaction to the suit against him. Henderson could hardly be expected to do nothing.

Every one of Henderson's actions which Toyota recites as evidence of bias was in reasonable response to Toyota's own actions in filing suit and alleging conspiracy between Henderson and the Union. Toyota, in effect, created any appearance of bias. If there were any indication of reasonable grounds for alleging conspiracy between Henderson and the Union, we would be confronted with a different question; but Toyota does not contend that there was any substance to the conspiracy allegation. It would be an old result to hold that a party to arbitration can manufacture bias by naming the arbitrator in a suit to enjoin the arbitration. It would

be equally inappropriate to find bias in any reasonable action taken in defense of that suit by the arbitrator. Such a result would allow a party who is reluctant to arbitrate a foolproof way to disqualify the arbitrator, by filing a suit.

A judge's alleged prejudice must result from an extrajudical source, and "[a] judge is not disqualified by a litigant's suit or threatened suit against him." *United States v. Studley,* 783 F.2d 934, 939-40 (9th Cir. 1986). Neither is there automatic bias when one of the parties chooses to file suit against the arbitrator in his or her professional capacity. To hold otherwise would thwart the congressional policy favoring arbitration of labor disputes. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960); *United Steelworkers of Am. v. American Mfg. Co.,* 363 U.S. 564, 566 (1960).

CONCLUSION

The district court order vacating the arbitration award is REVERSED.

Appendix B

In The United States District Court
For The Northern District Of California

No. C 86 5077 JPV

Toyota Of Berkeley, a corporation,
Plaintiff,

vs.

Automobile Salesmen's Union, Local 1095,
United Food And Commercial Workers Union,
Defendant.

Order And Judgment Vacating The
Arbitration Award of Joe H. Henderson

[Filed December 29, 1986]

The above-styled cause concerning the arbitration award of Joe H. Henderson (dated Sept. 23, 1986) came on regularly for hearing on December 4, 1986, John R. Bobay appearing on behalf of Plaintiff Toyota of Berkeley, and David A. Rosenfeld appearing on behalf of defendant, Automobile Salesmen's Union, Local 1095, United Food and Commercial Workers Union. This matter was initially brought to this Court by Toyota on its Complaint for Injunctive and Declaratory Relief under Section 301 of the Labor Management Relations Act of 1947 (filed Sept. 3, 1986) against the arbitration proceedings. To speed the resolution of this matter and to economize the costs of litigation, the parties had thereafter stipulated through their respective counsel, and this court approved said stipulation, that this matter be heard as cross-petitions or motions for summary judgment: Toyota moving to vacate the

arbitration award of Joe H. Henderson and Local 1095 seeking to confirm said arbitration award. See Stipulation and Order Changing Hearing Date to December 4, 1986, and Substituting Motions for Vacating and Confirming Arbitration Award in lieu of Motion for Summary Judgment (order signed & filed Nov. 6, 1986). Upon argument of counsel, having fully considered the pleadings, papers and records and statements on file herein and this Court being advised in the premises,

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Toyota's motion to vacate the arbitration award is granted and Local 1095's motion to confirm the award is denied on the ground that the arbitration award was made pursuant to an *ex parte* hearing (in the sense that Toyota did not participate in the hearing and the hearing took place without Toyota's consent) and there is no self-executing arbitration clause in the expired collective bargaining agreement between the parties which provides for such an *ex parte* proceeding, and on the further ground that the award was the product of bias or prejudice on the part the arbitrator. The arbitration award of Joe H. Henderson, dated September 23, 1986, is vacated and it is directed that this order and judgment be entered herein.

DATED: Dec 29, 1986.

/s/ John P. Vukasin, Jr.
United States District Judge

Appendix C

United States District Court
Northern District of California

Case No. C86-5077 JPV

Toyota Of Berkeley,
Plaintiff,

vs.

Salesmens' Local 1095, et al.,
Defendants.

Order Denying Motion For Sanctions

[Filed December 29, 1986]

On December 18, 1986, this matter came before the Court for hearing on defendant JOE H. HENDERSON's motion for Rule 11 sanctions against plaintiff and plaintiff's counsel John Bobay. Upon review of the pleadings submitted in support of and in opposition to the motion, and after having considered the arguments of counsel presented at the hearing, it is the Court's opinion that sanctions are not warranted under the circumstances.

Accordingly, IT IS HEREBY ORDERED that defendant's motion for Rule 11 sanctions is DENIED.

Date: Dec. 29, 1986

/s/ J. P. Vukasin, Jr., Judge
United States District Court

Appendix D

United States District Court
Northern District Of Californa

Case No. C 86-5077 JPV

Toyota Of Berkeley, a corporation,
Plaintiff,

vs.

Automobile Salesmen's Union Local 1095,
and Joe H. Henderson,
Defendants.

Order to Show Cause

[Filed September 29, 1986]

On September 9, 1986 this matter came before the Court on plaintiff's motion to have a previously issued temporary restraining order converted to a preliminary injuction. Plaintiff sought to further enjoin the arbitration of one Edward Fontes pending this Court's determination of the arbitrability of Fontes' grievance. Although the TRO did issue on September 3, 1986, the defendants have represented to the Court that notice of the TRO's issuance was not received until after the arbitration had been completed. Because the arbitration had already occurred, it was the Court's view that the best avenue by which the arbitrability issue could be decided would be to allow the arbitrator to issue his decision and have the plaintiff and union file motions to confirm and/or vacate the arbitration award. Accordingly, the motion for preliminary injunction was denied and a hearing date of October 24, 1986 was scheduled on the motions to vacate and/or confirm the

arbitration decision. In apparent recognition of the fact that the sought injuctive relief had become a moot remedy, plaintiff voluntarily dismissed the arbitrator, Joe H. Henderson, from the action on September 17, 1986.

On September 24, 1986 this Court received a copy of a letter from arbitrator Joe H. Henderson to counsel for Toyota of Berkeley and counsel for Local 1095, a copy of this letter is attached herein as exhibit "A". In said letter Henderson states that a decision was rendered and signed on September 23, 1986. Henderson further states, however, that his decision will not be released until such time that his both the arbitration fees have been paid by the parties, and his attorney costs and fees incurred in conjunction with defending himself in the TRO and preliminary injunction paid by plaintiff.

At the outset it should be noted that Rule 11 of the Federal Rules of Civil Procedure provides parties with an adequate vehicle for recovery of costs and fees incurred in defending against claims filed in bad faith. Accordingly, it is this Court's view that arbitrator Joe H. Henderson, by resorting to an extrajudicial method of fee and cost recovery, the withholding of a previously rendered and signed arbitration award, has apparently committed a willful act obstructing this Court's dispassionate administration of justice; to wit, the expeditious resolution of Civil Action C-86-5077 JPV.

Based on the forgoing, the good cause apearing;

IT IS HEREBY ORDERED that Joe H. Henderson APPEAR AND SHOW CAUSE BEFORE THE COURT

THE REASONS WHY, IF ANY, HE SHOULD NOT BE HELD IN CONTEMPT OF COURT. Such appearance shall be in person and shall be made at 10:00 a.m. on Thursday, October 9, 1986 in Courtroom 2, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102.

IT IS FURTHER ORDERED that any written explanation or certificate of counsel showing reasons why a contempt citation should not issue shall be filed with the Court no later than Monday October 6, 1986, and

IT IS FURTHER ORDERED that this Order to Show Cause shall stand vacated if the above referenced arbitration award is filed with the Court, and copies submitted to the parties to the arbitration, by the close of the business day, 5:00 p.m. on October 8, 1986.

Date: Sep 29, 1986

/s/ J. P. Vukasin, Jr., Judge
United States District Court

Joe H. Henderson
Arbitrator
P.O. Box 463
Santa Rosa, California 95402
(707) 578-7171
September 23, 1986

Vincent A. Harrington, Esq.
VanBourg, Weinberg, Roger
and Rosenfeld
875 Battery Street
San Francisco, CA 94111

Jay G. Putnam, Esquire
Redwood Employers Association
106 Wikiup Drive
Santa Rosa, CA 95401

John Bobay
50 Hillcrest Court
San Anselmo, CA 94960

RE: Automobile Salesmen's Union, Local No. 1095, United Food & Commercial Workers, AFL-CIO
-and-
Toyota of Berkeley
(Discharge of Ed Fontes, Grievant)

Gentlemen:

A decision in the above captioned matter has been rendered and signed by me on September 23, 1986.

A copy of the decision will be mailed to the parties upon receipt of payment of my fees and expenses in this case.

Attached is a copy of my bill with the appropriate expenses.

Thank you and should you have any questions please do not hesitate to contact this office.

Very truly yours,

/s/ Joe H. Henderson

JHH/dc

cc: Judge Vukasin, Jr. - United States District Judge
United States District Court Case No: C-86-5077-JPV

Exhibit "A" to 9/29/86 OSC

Joe H. Henderson
Arbitrator
P.O. Box 463
Santa Rosa, California 95402
(707) 578-7171

September 23, 1986

Vincent A. Harrington, Esq.
VanBourg, Weinberg, Roger
and Rosenfeld
875 Battery Street
San Francisco, CA 94111

Jay G. Putnam, Esquire
Redwood Employers Association
106 Wikiup Drive
Santa Rosa, CA 95401

John Bobay
50 Hillcrest Court
San Anselmo, CA 94960

RE: Automobile Salesmen's Union, Local No. 1095,
United Food & Commercial Workers, AFL-CIO
-and-
Toyota of Berkeley
(Discharge of Ed Fontes, Grievant)

1 day $500.00 for cancellation without a ten
(10) working day notice .....$ 500.00
(A hearing was scheduled for April 15,
1986. Received a call from Jay Putnam
on April 12, 1986 indicating that the
hearing was to be postponed.)

1 day at $500.00 per day for Hearing September 3, 1986	500.00
1 day at $500.00 per day for Studytime Dictation and Preparation of Decision...	500.00
TOTAL	$1,500.00
To be paid by the Employer: Reimbursement for expenses involved in defending U.S. District Court case (See Attached Bill).....	2,309.35

$ 750.00 to be paid by the Union.
$ 3,059.35 to be paid by the Employer.

Exhibit "A" to 9/29/86 OSC

Appendix E

Not For Publication

United States Court Of Appeals
For The Ninth Circuit

No. 87-1555

D.C. No. CV-86-5077-JPV

Toyota of Berkeley, a corporation,
Plaintiff/Appellee,

v.

Automobile Salesmen's Union, Local 1095,
United Food And Commercial Workers Union,
Defendant/Appellant.

Order

[Filed January 13, 1988]

Before: HUG, BOOCHEVER, and BRUNETTI, Circuit Judges.

The petition for rehearing is hereby denied.

Appendix F

In The Matter Of The Arbitration Between:

Automobile Salesmen's Union, Local No. 1095,
United Food & Commercial Workers, AFL-CIO

-and-

Toyota of Berkeley

Re: Discharge of Ed Fontes

Appearances:

ARBITRATOR:
Joe H. Henderson
P.O. Box 463
Santa Rosa, CA 95402

UNION:
Vincent A. Harrington, Esq.
VanBourg, Weinberg, Roger and Rosenfeld
875 Battery Street
San Francisco, CA 94111

COMPANY:
No Appearance

TOYOTA OF BERKELEY (hereinafter referred to as the "Company") and AUTOMOBILE SALESMEN'S UNION, LOCAL NO. 1095, UNITED FOOD & COMMERCIAL WORKERS, AFL-CIO (hereinafter referred to as the "Union") are parties to a current collective bargaining agreement. Pursuant to the appropriate provision of that Agreement, the parties selected Joe H. Henderson of Santa Rosa, California, as the sole, impartial arbitrator to make a final and binding determination in the instant dispute. A hearing on the matter was held on September 3, 1986 in Santa Rosa,

California, at which time the Union was afforded the right to introduce relevant evidence and argument. As will be noted in more detail *infra*, this was an *ex parte* proceeding.

ISSUE

Whether the discharge of Mr. Fontes was a violation of the Agreement; and if so, what should be the remedy?

RELEVANT PROVISIONS OF AGREEMENT

SECTION 4. DISCHARGE OF AND DISCRIMINATION AGAINST EMPLOYEES:

(4-1) No employee shall be discharged or discriminated against because of Union activities or upholding Union principles; . . .

(4-2) No employee shall be employed, retained in employment, discharged, or replaced for the evasion or violation of any of the provisions of this Agreement, or for the purpose of, or when the same may result in, the accomplishing of practices inconsistent with the terms and conditions of this Agreement.

(4-3) Except as provided in this Agreement, Union recognizes the right of the Employer to employ, retain in employment, discharge, or replace employees for the efficient operation of his business.,

(4-4) The Employer wil notify the Union in writing within twenty-four (24) hours of any quits or terminations of an employee, and the Union shall have seventy-two (72) hours upon receipt of notice of termination or

quits (Sundays and holidays excepted) to meet with the Employer to discuss the termination or quits.

SECTION 17. BOARD OF ADJUSTMENT:

(17-1) The Employer and the Union agree to meet and deal with each other or through their duly authorized representatives on the adjustment of disputes arising from the interpretation or application of the specific provisions of this Agreement.

(17-4) It is agreed that all decisions rendered by the impartial arbitrator or a majority of the grievance committee shall be final and binding upon the parties signatory hereto. Expenses incident to arbitration shall be borne one-half by the Employer and one-half by the Union. All discharge cases in dispute must be appealed in writing within three (3) work days, Monday through Friday, of the date of discharge.

(17-6) It is agreed that any grievance not submitted in accordance with the provisions of this Article shall be deemed untimely and shall be discussed. The time limits herein provided may be extended only upon mutual agreement in writing.

(17-7) In the event the parties signatory hereto fail to mutually agree upon an impartial arbitrator, the arbitrator shall be selected by respondent from a panel of not more than seven (7) arbitrators to be furnished by the State or Federal Mediation and Conciliation Service. Such arbitrator shall be empowered, except as his powers are limited below or by the submission agreement as follows:

(17-1.1) He shall have no power to add to, or subtract from, or modify any of the provisions of this or supplement agreements if any;

(17-7.3) He shall have no power to substitute his discretion for that of the Employer or the Union where either party has retained discretion or is given discretion by the expressed terms of this Agreement or by any supplementary written agreements, except that where he finds a disciplinary layoff or discharge results from a manifestly arbitrary exercise of the Employer's judgment in fixing the extent of the penalty, he may make appropriate modifications of the penalty;

(17-7.4) He shall have no power to decide any question which, under this Agreement is within the right of the Employer or the Union to decide . . .

(17-7.6) The parties agree that the power and jurisdiction of the Arbitrator shall be limited to deciding whether there has been a violation of a provision of this Agreement.

FACTS

Grievant, a sales person, was hired by the Company on or about August 3, 1982. Approximately six months later, on February 9, 1983, Grievant was terminated. On February 15, then Union Secretary/Treasurer, Rich Salvaressa wrote the Company to advise that the Union "is filing a formal Grievance for Violations" of the Agreement between the parties, specifically Salvaressa alleged that the Company violated Section 4 of the Agreement when it terminated Richard Heller and Grievant.

At all times material in this dispute, the Company was represented by the Redwood Employers Association of Santa Rosa, California. On March 14, Salvaressa wrote Andy Kilass at the Association to respond to his letter of February 28. Salvaressa, *inter alia*, advised Kilass that, on the terminations of Heller and Grievant "again we feel their terminations were unjustified." Salvaressa requested a meeting with Kilass on March 22 at the Union office.

On May 3, Salvaressa responded to an April 25 letter from Kilass by advising:

> " . . . if you have no intention of meeting [with the Union] to discuss all the Grievances filed [against the Company], then I suggest we proceed directly to Arbitration and let these matters be decided by an Arbitrator."

Salvaressa asked for an early response from Kilass.

On Janury 3, 1985 Jay Putnam, Esquire, on behalf of the Redwood Employers Association wrote Ed Allen at the State Mediation and Conciliation Service concerning a dispute between the parties:

> "Please consider this a formal request for two panels each consisting of seven experienced and neutral arbitrators to assist the parties in resolving two labor disputes. Please provide a copy of those panels to the Union's attorney, whose address is set forth below."

On January 4, Allen wrote Putnam and Union counsel (Rosenfeld) to comply with Putnam's request.

Thereafter, Rosenfeld advised this Arbitrator that he had been selected to serve as arbitrator in the instant dispute. On February 11, the Arbitrator

advised Putnam and Rosenfeld of his available dates for the hearing.

On February 14, Putnam wrote the Arbitrator to advise that the parties had agreed that the instant matter would be heard on Monday, April 15. Putnam also asked the Arbitrator to make the necessary arrangements for a court reporter. On April 9, Putnam again wrote the Arbitrator and informed him of the hearing's location.

On April 12, Putnam contacted the Arbitrator and advised that Union counsel wished to postpone the hearing. Accordingly, on April 12, the Arbitrator sent Putnam and Rosenfeld a Statement covering his cancellation fee.

On November 7, Rosenfeld wrote the Arbitrator requesting new dates for a hearing in the instant matter. On November 11, the Arbitrator sent Rosenfeld and Putnam a list of dates in January and February, 1986.

On April 17, Rosenfeld wrote the Arbitrator requesting new dates for a hearing in the instant matter. On April 22, the Arbitrator sent Rosenfeld and Putnam a list of dates in May, June and July, 1986.

On May 19, Union counsel (Boone) wrote the Arbitrator to advise that June 30, July 1, or July 2 would be acceptable dates for the hearing. However, on May 21, the Arbitrator advised Boone and Putnam that the acceptable dates to the Union were no longer available. Thus, seven additional dates were offered in July and August.

On June 4, Boone, with a copy to Putnam, advised the Arbitrator that five of the particular dates were acceptable to the Union.

On June 9, Putnam, with a copy to Boone, advised the Arbitrator that:

> "Please be advised that the Union has failed to comply with procedural requirements set forth in

> the collective bargaining agreement with respect to the above-referenced dispute. Accordingly, the employer will not participate in arbitration of this controversy."

Four days later, Boone wrote Putnam to advise that the Arbitrator had already been selected and that:

> "Any alleged failure to comply with time requirements in the contract is for the Arbitrator to decide. Your refusal to proceed to arbitration, as set forth in your June 9, 1986 letter, is in bad faith, and without legal basis. If I do not hear from you within one week, agreeing to set this matter for arbitration, we will take appropriate legal action, and seek attorneys' fees and costs."

On June 18, Rosenfeld, with a copy to Putnam, wrote the Arbitrator to, in general fashion, restate the history of the grievance. The letter included, among other things, that Rosenfeld had asked the Arbitrator to provide dates to Putnam and himself so that the matter could be heard "since the Ninth Circuit had affirmed another arbitration award which was related to the matter in dispute before you." Further, Rosenfeld's position, on behalf of the Union, was that the Arbitrator was selected under the contract terms and agreed to by the parties. Thus, the Arbitrator would "have the authority to hear this matter whether Mr. Putnam chooses to participate or not" and that:

> "In my view, whether or not the employer can withdraw from an arbitration once having agreed to arbitrate the matter, and having agreed to the Arbitrator, is a matter of interpretation of the contract, which mandates arbitration of such procedural disputes . . . "

On June 23, the Arbitrator wrote Rosenfeld and Putnam setting the hearing date for Wednesday, August 6 at his office.

On July 3, Putnam, with a copy to Boone, wrote the Arbitrator to reiterate the company's position that the matter was not properly before the Arbitrator (citing the fairly recent *AT&T Technologies, Inc. v. Communication Workers of America, et al,* 86 Daily Journal B.A.R. 1269 (4/7/86). The U.S. Supreme Court held, in the *AT&T* case, that the issue of whether or not the particular dispute was subject to arbitration should have been decided by the Court and should not have been referred to the arbitrator.

Thereafter, on July 28, the Arbitrator wrote Rosenfeld and Putnam to advise that he had reviewed Putnam's letter of June 9 and that:

> I feel it is in best interests of all parties involved that this matter be continued from August 6, 1986 to September 3, 1986 at 10:00 a.m. at my office in Santa Rosa. This will give Mr. Putnam an opportunity to seek, in the appropriate court, an order of prohibition for the arbitration proceeding. That way the court will make the decision on whether or not the employer can withdraw from the arbitration once the matter has been agreed to be arbitrated and the arbitrator has been selected.
>
> If Mr. Putnam is not successful in receiving a restraining order prohibiting the arbitration from proceeding, then I will proceed on the date indicated above.

The instant hearing began at 10:10 a.m. on September 3. The Arbitrator advised the Union that, on the basis of a telephone call his secretary had received, he

was waiting for an appearance from Mr. John Bobay who represented the Redwood Employers Association. Mr. Bobay had contacted the Arbitrator's office on September 2 to indicate that he was going to court on the morning of September 3 to obtain a temporary restraining order.

The Arbitrator advised the Union that he wished to wait until 10:45 a.m. to see if the Employer contacted his office to advise whether a temporary restraining order had been obtained. At 10:45 a.m., no word had been received and, therefore, the hearing commenced notwithstanding the Employer's absence.

The Union put on its case and, at 11:13 a.m. Bobay called. The Arbitrator and Union counsel went to the phone so that both could participate in the telephone call. Bobay indicated that he had received a restraining order from the Federal District Court regarding this proceeding and that copies would be sent to the Arbitrator and Union counsel. Bobay indicated, in response to a question from Union counsel, that the order was signed at approximately 10:20 or 10:30 a.m.

EVIDENCE AND POSITION OF UNION

Salvaressa testified that the Company never gave the Union any particular reason why Grievant was terminated. The grievance filed by Salvaressa was timely filed. Salvaressa made an effort to set up a Board of Adjustment. Subsequently, he met with Company representatives to discuss the terminations of Grievant, Floyd Johnson and Bill Echols.

Johnson's and Echols' cases went to arbitration. In each, arbitrators ruled in the Union's favor. However, discussions with the employer concerning Grievant's case did not resolve the issue. The parties were deadlocked.

The Company carries the burden to prove its case on both the timeliness issue and the substantive termination issue. The Company, quite obviously, did not participate in the arbitration and, therefore, it did not sustain its burden of proof. Grievant must be made whole in wages and benefits. The Arbitrator should remand remedy issues to the parties and retain jurisdiction in case of disputes over the make whole remedy.

As to the Company's failure to appear at the hearing, it is quite evident that the Company had adequate notice. The Company had long since participated in the process to select an arbitrator. Mr. Putnam, attorney for the Company, wrote the Mediation and Conciliation Service for a list of arbitrators.

Under the Federal Rules of Civil Procedure, a party must be given at least twenty-four notice that another party intends to make an *ex parte* application for a temporary restraining order. The Union received no such notice, even though the matter had been set for a hearing since, at least, July 28, 1986.

OPINION

Without question, arbitrators do their best to avoid *ex parte* hearings. Quite obviously, an *ex parte* hearing

deprives the trier-of-fact of the benefits of the adversary system – especially, the often helpful results of cross-examination.

However, where parties have contractually agreed to arbitrate labor disputes, one party cannot frustrate the process by refusing to appear on the basis of a *procedural* arbitrability claim; e.g., timeliness. The Company, on the basis of its correspondence, apparently reads *AT&T Technologies* to mean that *all* arbitrability questions are matters for the courts, not arbitrators to decide. Clearly, *AT&T Technologies* reiterates the well established principle in labor relations law that *substantive* questions (i.e., whether the dispute itself falls under the arbitration clause) are for judicial determination in the first instance.

The Code of Professional Responsiblity for Arbitrators of Labor/Management Disputes, *inter alia*, provides:

> "1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.
>
> 2. An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing." (5(c))

The Arbitrator must confess to concerns over the future labor relationship between the parties, such concerns are irrelevant to the instant matter. The fact is that the Company agreed to participate in the arbitration, sought a list of arbitrators from which to strike names, participated in the selection of this Arbitrator

and otherwise gave all indications of participation until on or about June 9, 1986. The Company was well aware of the time and date of the hearing. In fact, for the Company's benefit, the Arbitrator extended by approximately one month the scheduled hearing date so that the Company would have time to obtain a Restraining Order. The Company did not do so in a timely fashion as the Union's case was "in" by the time the Arbitrator and Union received telephonic communication from the Company that an order had been obtained.

Despite the absence of a just cause provision in the Agreement, it is black letter arbitral law that the Company must demonstrate, by clear and convincing evidence, that it had the right to terminate Grievant. The Company produced no such evidence in this proceeding.

The procedural arbitrability question is an affirmative defense to the Union's grievance. Again, the Company must bear the burden of proof and it has not done so.

The Arbitrator has no choice other than to accept the Union's unrebutted evidence that Grievant was not given a reason for his termination. Such arbitrary action cannot stand. Grievant must be reinstated and made whole.

AWARD

The discharge of Mr. Fontes was a violation of the Agreement. Mr. Fontes shall be made whole in wages and benefits, less interim earnings, if any.

DATED: 9/23/86

/s/ Joe H. Henderson, Arbitrator

Appendix G

SECTION 17 OF THE COLLECTIVE BARGAINING AGREEMENT:

(17-1) The Employer and the Union agree to meet and deal with each other or through their duly authorized representatives on the adjustment of disputes arising from the interpretation or application of the specific provisions of this Agreement.

(17-2) Grievances or disputes arising from the interpretation or application of the provisions of this Agreement must be submitted in writing to the Employer by the grievant within seven (7) days from the date the incident giving rise to the grievance is alleged to have first occurred. Grievances not adjusted satisfactorily between the employee and his supervisor or their respective representatives shall be referred to a grievance committee for settlement as hereinafter provided. Grievances or disputes going before the grievance committee must be in writing citing the specific provision of this Agreement allegedly violated and the relief sought. To be timely, the grievance must be referred to the grievance committee within seven (7) days after the Employer's denial of the grievance. In the event the grievance committee is unable to resolve the matter, the grievance shall then be referred to an impartial arbitrator for final and binding settlement.

(17-3) The grievance committee shall be composed of two (2) representatives chosen by the Employer, and two (2) representatives chosen by the Union.

(17-4) It is agreed that all decisions rendered by the impartial arbitrator or a majority of the grievance committee shall be final and binding upon the parties signatory hereto. The expenses incident to arbitration shall be borne one-half by the Employer and one-half by the Union. All discharge cases in dispute must be appealed in writing within three (3) work days, Monday through Friday, of the date of discharge.

(17-5) The parties agree that matters properly to be referred to arbitration shall first be reduced to writing, citing the specific provisions of this Agreement allegedly violated, or for which interpretation is desired, including the relief sought. To be timely and insure prompt settlement of disputes, the Union shall serve written demand for arbitration upon Employer within but not exceeding thirty (30) calendar days from the date the incident giving rise to the grievance is alleged to have first occurred.

(17-6) It is agreed that any grievance not submitted in accordance with the provisions of this Article shall be deemed untimely and shall be dismissed. The time limits herein provided may be extended only upon mutual agreement in writing.

(17-7) In the event the parties signatory hereto fail to mutually agree upon an impartial arbitrator, the arbitrator shall be selected by respondent from a panel of not more than seven (7) arbitrators to be furnished by the State or Federal Mediation and Conciliation Service. Such arbitrator shall be empowered, except as his powers are limited below or by the submission agreement as follows:

(17-7.1) He shall have no power to add to, or subtract from, or modify any of the provisions of this or supplement agreements if any;

(17-7.2) He shall have no power to establish wage scales or change any existing wage rate in this Agreement;

(17-7.3) He shall have no power to substitute his discretion for that of the Employer or the Union where either party has retained discretion or is given discretion by the expressed terms of this Agreement or by any supplementary written agreements, except that where he finds a disciplinary layoff or discharge results from a manifestly arbitrary exercise of the Employer's judgment in fixing the extent of the penalty, he may make appropriate modifications of the penalty;

(17-7.4) He shall have no power to decide any question which, under this Agreement is within the right of the Employer or the Union to decide. In rendering decisions, the arbitrator shall have due regard for the rights and responsibilities of the Employer and shall so construe the Agreement so that there will be no interference with the exercise of such rights and responsibilities, except as those rights are expressly conditioned or limited by the terms of this Agreement;

(17-7.5) Employer liability for any claim for back wages shall be limited to the amount of wages the employee would have been entitled as outlined in Section 6-3 of the Agreement, less any unemployment compensation entitlement or other compensation for personal services received from any source during the period involved in the dispute;

(17-7.6) The parties agree that the power and jurisdiction of the Arbitrator shall be limited to deciding whether there has been a violation of a provision of this Agreement.